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January 24, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearings
Date of Filing: April 8, 2005
Case Number: TSO-0226

This Decision concerns the eligibility of **XXXXXXXXXXXX** (hereinafter "the Individual") for continued access authorization. This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the Individual is not yet sufficiently rehabilitated and reformed to the point where his access authorization might be restored.

I. APPLICABLE REGULATIONS

The regulations governing an individual's eligibility for access authorization (also "security clearance") are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining eligibility for Access to Classified Matter or Special Nuclear Material." An individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). "Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security." *Id.* See generally *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) ("the 'clearly consistent with the interests of national security' test indicates that 'security-clearance determinations should err, if they must, on the side of denials'"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance).

If a question concerning an individual's eligibility for a clearance cannot be resolved, the matter is referred to administrative review. 10 C.F.R. § 710.9. The individual has the option of obtaining a decision by the manager at the site based on the existing information or appearing before a hearing officer. 10 C.F.R. § 710.21(b)(3). The burden is on the individual to present testimony or evidence to demonstrate that he is eligible for access authorization, i.e., that access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(a).

In December 2004, the DOE notified the Individual that there was derogatory information that created a substantial doubt as to the Individual's continued eligibility for an access authorization under 10 C.F.R. § 710.8, paragraphs (h)¹ and (j)². Notification Letter dated December 9, 2004 to XXXXXXXXXXXXXXXXXXXX. Upon receipt of the Notification Letter, the Individual requested a hearing in this matter. The DOE forwarded the request for a hearing to the Office of Hearings and Appeals (OHA) and I was appointed to serve as the hearing officer.

II. BACKGROUND

The Individual has been employed by a contractor at a DOE facility in a position that requires him to have an access authorization. On January 21, 2004, the Individual was seen drinking wine during working hours and tested positive for a blood alcohol content of ".054, which is above the allowable limit of .02." Notification Letter, Attachment. At that point the Individual's security clearance was suspended. During a Personnel Security Interview (PSI) conducted on February 9, 2004, the Individual verified that he was found drinking a glass of wine on the job and admitted to drinking on the job on other occasions. Attachment, Notification Letter. During the PSI the Individual stated that it was his intention to never use alcohol again.

On May 21, 2004, the Individual was examined by a DOE-sponsored psychiatrist who found that the Individual "meets The Diagnostic and Statistical Manual of the American Psychiatric Association, Fourth Edition TR. (DSM-IV TR.) for Substance Dependence, Alcohol With Physiological Dependence, Active." Attachment, Notification Letter. The psychiatrist also opined that the Individual has an illness or mental condition, which causes, or may cause, a significant defect in judgment or reliability. Attachment, Notification Letter. It also appeared that between the PSI in which he vowed abstinence, and the psychiatric interview, the Individual had relapsed and consumed alcohol one time.

In conducting the interview, the psychiatrist was asked by DOE to consider four questions:

- a. Has the subject been or is the subject a user of alcohol habitually to excess or is he alcohol dependent or suffering from alcohol abuse?
- b. If so, is there adequate evidence of rehabilitation or reformation?

¹ (h) An illness or mental condition of a nature which, in the opinion of a psychiatrist or licensed clinical psychologist, causes or may cause, a significant defect in judgment or reliability.

² (j) Been, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse.

- c. If not rehabilitated or reformed, what length of time and type of treatment would be necessary for adequate evidence of rehabilitation or reformation?
- d. Does the subject have an illness or mental condition which causes, or may cause, a significant defect in judgment or reliability?

Report of Psychiatric Interview (Psychiatric Interview Report) dated May 27, 2004.

The psychiatrist responded "yes" to a. and "no" to b. That is, the doctor answered that the Individual has been or is a user of alcohol habitually to excess and there is not adequate evidence of rehabilitation or reformation. To question c the doctor stated that for adequate evidence of rehabilitation: 100 hours of AA with a sponsor and working the 12-steps would be necessary, or 6 months of participation in a professionally led alcohol treatment program. For either process, two years of sobriety would also be necessary to demonstrate the effectiveness of the treatment. If the Individual does not go through one of the two rehabilitation programs above, then three years of sobriety would be necessary. Report at 11. In response to d. – "Does the subject have an illness or mental condition which causes, or may cause, a significant defect in judgment or reliability?" – the psychiatrist answered "yes." Psychiatric Interview Report.

In May 2004, the same month as the psychiatric interview, the Individual "voluntarily entered an outpatient rehabilitation program with St. Vincent's hospital in Santa Fe NM." Individual's response to Notification Letter, March 3, 2005. According to the Individual, the program consists of "4 weeks of intensive therapy, giving me the tools and education of physiological treatment for this disease, showing me that with good counseling, family support, AA, and laboratory treatment . . . this disease is controllable." Response to Notification Letter.

Also according to the Individual, he is

- currently tested twice a week for alcohol randomly . . . and has never tested positive
- currently undergoing weekly counseling at his workplace
- seeing the resident psychiatrist at the treating hospital once every 3 months
- active in AA and has had a sponsor since May, 2004, and
- receiving counseling and pharmaceutical help from his local private physician.

There is no dispute as to any of the foregoing.

III. THE HEARING

Attending the Hearing were the Individual, DOE Counsel and the DOE-sponsored psychiatrist. There were three witnesses on behalf of the Individual, including the Individual's spouse and one other person, who each testified by telephone. Although a witness, the DOE psychiatrist remained present during the entire Hearing in order to receive any information that might lead to a revision of doctor's initial opinion. Because the Individual was not represented by counsel, DOE Counsel assisted very ably and impartially in qualifying and examining each witness.

DOE Counsel briefly outlined the matters that had led to the Notification Letter which are set forth above. Counsel also stated that "[t]he central issue that I see on behalf of personnel security is whether there is adequate evidence of what we call reformation and rehabilitation." Transcript of the November 15, 2005, Hearing at 7 (hereinafter "Tr.").

On his own behalf, the Individual testified that beginning in March, 2004, he had completely abstained from alcohol and taken all of the measures described in the Response to the Notification Letter, set forth above. In addition, he testified and documented that he has been randomly tested for alcohol once or twice a week since August of 2004, approximately 20 months, with no positive test results. Tr. at 8 – 12.

The Individual's spouse testified that she was absolutely positive he had not consumed any alcohol for the past 20 months. She also affirmed that they were open about the Individual's difficulty with alcohol. She stated her strong belief that the Individual would remain abstinent.

The second witness was a co-employee of the individual who is responsible for "the drug and alcohol counseling" at the individual's workplace. Tr. at 31. The witness is a master's level counselor, a licensed "LPCC," and a clinical mental health therapist with undergraduate work in psychology. Tr. at 30. This person's testimony affirmed what the Individual has stated concerning his counseling at the workplace, his perfect record of negative alcohol tests, and the hospital-sponsored treatment he voluntarily undertook and completed. Tr. at 31-5. In addition, the witness testified that he meets with the Individual on a regular basis for ongoing evaluation, follow-up and counseling. This witness had read and agreed with the evaluation and opinion of the DOE-sponsored psychiatrist – summarized earlier – and viewed the Individual's chances of remaining sober as "very, very high." Tr. at 46.

The last witness was an attendee of the same Alcoholics Anonymous group as the Individual. According to the witness he attended the meetings "just about

every night" but "guessed" he had only seen the individual there 12 or 14 times over the past year that he had known the Individual. Tr. at 62-4. By way of clarification he testified that sometimes he would see the Individual more than once a week but sometimes not for several weeks. This differed somewhat from the Individual's testimony and there was some discussion of that disparity, but no resolution. Tr. at 61-72.

The DOE psychiatrist testified at length concerning the criteria he brought to his initial evaluation of the Individual and how he viewed the Individual's status vis-à-vis rehabilitation and reformation at the time of the hearing. The doctor stated that "rehabilitation means that you go through a program or a process that restores you to a higher level of functioning." Tr. at 76. This would include the hospital-sponsored program which the Individual completed as well as AA. Tr. at 76-8. "Reformation just . . . means you've changed your ways." Tr. at 77. In terms of rehabilitation, the psychiatrist observed that the Individual had both attended the hospital-sponsored program and joined AA and "that's definitely favorable." Tr. at 78. Together with having completed 20 months of sobriety at the time of the Hearing, he stated that "those are all good things." Tr. at 78-9.

Concerning his evaluation of the Individual's status at the time of the Hearing, the doctor observed that ReVia – a prescribed medication which the Individual takes -- does not, clinically, reduce cravings for alcohol as the Individual thinks it does, nor does it reduce risk of relapse to alcohol. Tr. at 83-5. To the contrary

[It's] sort of a crutch that you're using, and maybe if you weren't taking it, your risk of relapse would be higher, because you think it cuts down on cravings, and it might, but if it does, it's not because of anything pharmacological, it's just because you know you're taking this drug and you maybe feel less likely to relapse . . .

Tr. at 84.

I understand the doctor to mean that the Individual's reliance on a placebo effect of the ReVia introduces a further imponderable into his assessment of the Individual's likelihood of relapse.

As to the Individual's participation in AA, the psychiatrist testified that:

(I)n my experience, most people that I've encountered that have been in the AA program for years have gone through the 12 steps of AA. So the fact that you've only done three of the 12 steps . . .

* * *

So my sense is . . . in comparing you to other people that are with AA is that your involvement with AA is somewhat minimal.

Tr. at 82-86.

Taking all this and the initial evaluation into account, the psychiatrist testified that at the time of the Hearing, the Individual comes close, but doesn't "exactly meet my criteria for adequate evidence . . . of rehabilitation." Tr. at 87.

Even though you have 20 months of sobriety . . . I'm not really impressed that you're really into the AA, which has the highest rate of success in keeping people sober.

* * *

Given everything, I'm going to make the opinion that – or even though you're showing evidence of rehabilitation or reformation, my opinion is that as of today, it's not adequate as I define adequate.

* * *

(I)f I had to estimate, in my opinion, your risk of relapse in the next five years (is) probably about 20 percent.

Tr. at 87-91.

IV. STANDARD OF REVIEW

Applicable DOE regulations state that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. §710.7(a). In resolving questions about the individual's eligibility for access authorization, I must consider the relevant factors and circumstances connected with the individual's conduct, set out in Section 710.7(c): the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; how recently and often the conduct occurred; the age and maturity of the individual at the time of the conduct; whether participation was voluntary; rehabilitation, reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors.

A DOE administrative review proceeding under 10 C.F.R. Part 710 is authorized when the existence of derogatory information leaves unresolved questions about an individual's eligibility for access authorization. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. §710.21(b)(6). Once DOE has presented derogatory information affecting an individual's eligibility for access authorization, the individual must come forward with evidence to convince DOE that restoring his or her access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." See, e.g., Personnel Security Hearing (Case No. VSO-0013), 25 DOE ¶ 82,752 at 85,511 (1995), and cases cited therein. Any doubt regarding an individual's eligibility for access authorization shall be resolved in favor of the national security. 10 C.F.R. § 710.7(a). For the reasons discussed below, it is my opinion that the Individual has not resolved the concerns in the Notification Letter, and should not be granted access authorization at this time.

V. OPINION

The steps that the Individual has taken for rehabilitation and the steps taken towards reformation of his behavior are impressive. He is clearly committed to reformation. Assuming he follows the hearing advice of the DOE-sponsored psychiatrist, there is little doubt in my mind that the Individual will succeed and his access authorization may be restored. However, I am persuaded by the clear, thoughtful opinion of the DOE-sponsored psychiatrist that this time has not yet come. See, Personnel Security Hearing, Case No. TSO-0253, 29 DOE para. 82,867 (2005) (21 months insufficient)

Based upon the testimony and other evidence submitted at the hearing, I cannot conclude that the Individual's present level of involvement with AA is sufficient for reformation. Even by his own testimony, he only attends AA sporadically and has not gone far in progressing through the 12 steps. Whether that might in some part be attributable to the AA group he joined is not relevant except in assessing the Individual's level of commitment. In other words, if the commitment to full behavior reformation was strong and paramount, the Individual could, for example, have found another group. The same considerations apply to his assertion that the domestic duties he undertakes negatively impacts on the time available for AA. The commitment to reformation should be paramount.

I also agree with the psychiatrist's rationale for seeking a high of confidence in the Individual's reformation before concluding that restoration of a security clearance "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(a). In this case, as re-evaluated during the Hearing, the psychiatrist could only find an 80 percent

level of confidence in the Individual's reformation. In the absence of any countervailing material or considerations, a 20 percent possibility of relapse is too significant to warrant a restoration of a security clearance. See, Personnel Security Hearing, Case No. TSO-0253, 29 DOE para. 82,867 (2005) (21 months insufficient)

VI. CONCLUSION

The Individual has not resolved the Criteria H and J concerns set forth in the Notification Letter. Therefore, I cannot conclude that restoring the Individual's access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I have concluded that the Individual's access authorization should not be restored.

Richard T. Tedrow
Hearing Officer
Office of Hearings and Appeals

Date: January 24, 2006